# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statute involved | 2 |
| Statement | 3 |
| Argument | 5 |
| Conclusion | 6 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378 | 6 |
| *Jennings* v. *Commissioner*, 110 F. (2d) 945 | 5 |
| *Johnston* v. *Commissioner*, 86 F. (2d) 732 | 5 |
| *Klingenstein* v. *United States*, 18 F. Supp. 1015 | 5, 6 |
| *Neuberger* v. *Helvering*, No. 5, present Term | 5, 6 |
| *United States* v. *Coulby*, 258 Fed. 27 | 5 |
| Statute: | |
| Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 23 | 2 |




246304—40

# In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 128

EMIL MOSBACHER, PETITIONER

*v.*

THE UNITED STATES

*ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court below (R. 14–16) is reported in 30 F. Supp. 703.

### JURISDICTION

The judgment of the court below was entered January 8, 1940 (R. 20). The time to file a petition for writ of certiorari was extended until June 7, 1940, by orders of Chief Justice Hughes signed on March 26, 1940, and May 8, 1940 (R. 20). The petition for writ of certiorari was filed June 6, 1940 (R. 21). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

## QUESTIONS PRESENTED

1. Whether, under Section 23 (r) of the Revenue Act of 1932, petitioner may offset losses on the sale of noncapital securities owned by him as an individual against his 91% share of the profits of a partnership derived from the sale of noncapital securities.

2. Whether petitioner may raise the foregoing question, in view of the fact that he failed to raise it below.

## STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * * *
>
> (e) LOSSES BY INDIVIDUALS.—Subject to the limitations provided in subsection (r) of this section, in the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—
>
> * * * * * *
>
> (2) if incurred in any transaction entered into for profit, though not connected with the trade or business;
>
> * * * * * *
>
> (r) LIMITATION ON STOCK LOSSES.—
>
> (1) Losses from sales or exchanges of stocks and bonds (as defined in subsection (t) of this section) which are not capital assets (as defined in section 101) shall be

allowed only to the extent of the gains from such sales or exchanges (including gains which may be derived by a taxpayer from the retirement of his own obligations).

* * * * *

## STATEMENT

The special findings of fact of the court below (R. 6–14) may be summarized as follows:

Petitioner, a resident of New York State, is engaged in buying and selling securities principally on the New York Curb Exchange (R. 6).

During the year 1932, petitioner and three others, named Leonard C. Greenstein, Milton Stern, and Cecil Schwartz, were associated in the securities business. The individual interest of each in the enterprise was as follows (R. 10):

| | |
|---|---|
| Emil Mosbacher | 91% |
| Leonard C. Greenstein | 5% |
| Milton Stern | 2% |
| Cecil Schwartz | 2% |

Petitioner filed an individual income tax return for the calendar year 1932 on March 15, 1933, showing a net income of $63,263.59. On the same day, a return signed by him was filed on a partnership return form 1065 for the association (R. 6–7).

By letter dated May 8, 1935, the Commissioner of Internal Revenue advised petitioner that he proposed to make an additional individual assessment of $49,564.22, which assessment, together with interest of $6,293.30, was paid by petitioner July 17, 1935 (R. 7–8).

On October 9, 1936, petitioner filed a claim for refund for 1932 of $55,857.52 on the ground that a loss of $130,434.27 on the sale of securities held less than two years had not been allowed as a deduction against petitioner's share of the profits on the sale of noncapital securities by the association (R. 8).

On April 9, 1937, the Commissioner advised petitioner of his proposed rejection of this claim, stating as his principal ground that the association was a partnership, and that, therefore, petitioner's individual losses could not be offset against the profit which was derived by him from the partnership (R. 9).

Prior to and while some of the actions heretofore referred to were being taken, petitioner filed protests and briefs in connection with his tax liability for the years 1930 and 1932 in which he characterized the association as a "partnership" (R. 9).

The arrangement under which the association was conducted was the result of a verbal agreement made originally on April 14, 1930, and renewed in December, 1931, for the year 1932. No mention was made by petitioner or any of the parties as to whether any loss which the association might incur would be shared in by Greenstein, Stern, or Schwartz, and no loss was incurred in any of the years in which the association operated (R. 11–12).

All four associates were members of the New York Curb Exchange, but all business was transacted in the name of petitioner and all brokerage

accounts were maintained in his name. Petitioner contributed all of the capital for the operation of the business, but each of the four members had drawing accounts based on an estimate of their net worth to the firm (R. 12). Petitioner maintained separate profit and loss accounts for his individual business and for the firm business (R. 13).

On the basis of these findings of fact, the court below found as a conclusion of law that petitioner was not entitled to the refund sought (R. 14).

## ARGUMENT

The sole issue presented to the court below was whether or not the association involved constituted a partnership (R. 6, 14). Petitioner does not now dispute the court's determination that the association was a partnership, but urges that certiorari should be granted because the question of whether individual security losses may be offset against partnership security profits is before this Court in the case of *Neuberger* v. *Helvering*, No. 5, October Term, 1940, certiorari granted May 27, 1940. Petitioner further urges that the court below erred in following *Johnston* v. *Commissioner*, 86 F. (2d) 732 (C. C. A. 2d), and *Klingenstein* v. *United States*, 18 F. Supp. 1015 (C. Cls.), and that its decision is in conflict with *Jennings* v. *Commissioner*, 110 F. (2d) 945 (C. C. A. 5th), and *United States* v. *Coulby*, 258 Fed. 27 (C. C. A. 6th).

It is true, as alleged by petitioner, that the court below applied the rule of the *Neuberger*, *Johnston*,

and *Klingenstein* cases. And since the *Neuberger* case is now pending before the Court, we would ordinarily be inclined to acquiesce in the petition. However, it appears that nowhere in the proceedings below, neither on brief nor in oral argument, did petitioner attack the rule of these cases: he contended simply that the association was not a partnership, thereby attempting to circumvent the result reached in those cases. There is considerable doubt whether it is open to petitioner to raise the issue now. Cf. *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 380. In the circumstances, it would seem inappropriate for the Court to grant certiorari.

CONCLUSION

Although this would ordinarily be an appropriate case for certiorari, since the court below applied the rule of law involved in the pending *Neuberger* case, we believe that certiorari should be denied in view of the procedural impediment.

Respectfully submitted.

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JULY, 1940.

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